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4 UNITED STATES DISTRICT COURT  
5 EASTERN DISTRICT OF WASHINGTON

6 RAY SCOTT, )  
7 Plaintiff, ) No. CV-11-417-JPH  
8 v. ) ORDER GRANTING DEFENDANT'S  
9 CAROLYN W. COLVIN, Acting ) MOTION FOR SUMMARY JUDGMENT  
10 Commissioner of Social )  
11 Security, )  
12 Defendant. )

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13 BEFORE THE COURT are cross-motions for summary judgment. ECF  
14 No. 16, 17. Attorney Maureen J. Rosette represents plaintiff.  
15 Special Assistant United States Attorney Franco L. Becia  
16 represents the Commissioner of Social Security (defendant). The  
17 parties have consented to proceed before a magistrate judge. ECF  
18 No. 10. On April 5, 2013, plaintiff filed a reply. ECF No. 19.  
19 After reviewing the administrative record and the briefs filed by  
20 the parties, the court **grants** Defendant's Motion for Summary  
21 Judgment, ECF No. 17.

22 **JURISDICTION**

23 On October 20, 2008, plaintiff applied for supplemental  
24 security income (SSI) and disability insurance benefits (DIB)  
25 alleging disability as of December 29, 2004 (Tr. 172-176). At the  
26 hearing Scott amended onset to April 29, 2008 (Tr. 40-41). The  
27 applications were denied initially and on reconsideration (Tr.  
28

1 118-125). Scott alleges disability due to physical and mental  
2 limitations.

3 Administrative Law Judge (ALJ) James W. Sherry held a hearing  
4 December 3, 2009. Plaintiff, represented by counsel, and a  
5 vocational expert testified (Tr. 37-72). On December 18, 2009, the  
6 ALJ issued an unfavorable decision (Tr. 13-28). The Appeals  
7 Council denied review October 13, 2011 (Tr. 1-6), making the ALJ's  
8 decision the final decision of the Commissioner and appealable to  
9 the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed  
10 this action for judicial review November 1, 2011. ECF No. 1, 4.

11 **STATEMENT OF FACTS**

12 The facts have been presented in the administrative hearing  
13 transcript, the ALJ's decision, and the briefs of the parties.  
14 They are only briefly summarized here.

15 Plaintiff was 48 years old at onset and 50 at the hearing  
16 (Tr. 42). Scott attended high school and earned a GED (Tr. 43,  
17 572). He has worked as a cashier, short order cook, waiter, gate  
18 guard, security guard, bartender, cook's helper and house cleaner  
19 (Tr. 64-65). He is single and lives alone in an apartment (Tr.  
20 43). Scott testified he was diagnosed with HIV in February 2001.  
21 He suffers anxiety and depression daily. He feels tired, worried,  
22 sleepless, fatigued and has no appetite. His vision is blurry. He  
23 has pain in his fingers, hips, back and knees. He can sit or stand  
24 for 30 minutes and walk a few blocks at a leisurely pace. Scott  
25 testified he thought he could stand or walk for 3-4 hours out of  
26 eight and sit for 3-4 hours but would need to lie down. He can  
27 lift ten pounds. He uses marijuana and was trying to get a medical  
28 marijuana card but had been turned down (Tr. 47-52, 54-55, 57,

1 60).

2 **SEQUENTIAL EVALUATION PROCESS**

3 The Social Security Act (the Act) defines disability as the  
4 as the "inability to engage in any substantial gainful activity by  
5 reason of any medically determinable physical or mental impairment  
6 which can be expected to result in death or which has lasted or  
7 can be expected to last for a continuous period of not less than  
8 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act  
9 also provides that a Plaintiff shall be determined to be under a  
10 disability only if any impairments are of such severity that a  
11 plaintiff is not only unable to do previous work but cannot,  
12 considering plaintiff's age, education and work experiences,  
13 engage in any other substantial gainful work which exists in the  
14 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
15 Thus, the definition of disability consists of both medical and  
16 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
17 (9<sup>th</sup> Cir. 2001).

18 The Commissioner has established a five-step sequential  
19 evaluation process for determining whether a person is disabled.  
20 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
21 is engaged in substantial gainful activities. If so, benefits are  
22 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,  
23 the decision maker proceeds to step two, which determines whether  
24 plaintiff has a medically severe impairment or combination of  
25 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

26 If plaintiff does not have a severe impairment or combination  
27 of impairments, the disability claim is denied. If the impairment  
28 is severe, the evaluation proceeds to the third step, which

1 compares plaintiff's impairment with a number of listed  
2 impairments acknowledged by the Commissioner to be so severe as to  
3 preclude substantial gainful activity. 20 C.F.R. §§  
4 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpt. P  
5 App. 1. If the impairment meets or equals one of the listed  
6 impairments, plaintiff is conclusively presumed to be disabled.  
7 If the impairment is not one conclusively presumed to be  
8 disabling, the evaluation proceeds to the fourth step, which  
9 determines whether the impairment prevents plaintiff from  
10 performing work which was performed in the past. If a plaintiff is  
11 able to perform previous work, that Plaintiff is deemed not  
12 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At  
13 this step, plaintiff's residual functional capacity (RFC)  
14 assessment is considered. If plaintiff cannot perform this work,  
15 the fifth and final step in the process determines whether  
16 plaintiff is able to perform other work in the national economy in  
17 view of plaintiff's residual functional capacity, age, education  
18 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
19 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

20 The initial burden of proof rests upon plaintiff to establish  
21 a *prima facie* case of entitlement to disability benefits.  
22 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
23 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
24 met once plaintiff establishes that a physical or mental  
25 impairment prevents the performance of previous work. The burden  
26 then shifts, at step five, to the Commissioner to show that (1)  
27 plaintiff can perform other substantial gainful activity and (2) a  
28 "significant number of jobs exist in the national economy" which

1 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
2 Cir. 1984).

### 3 STANDARD OF REVIEW

4 Congress has provided a limited scope of judicial review of a  
5 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
6 the Commissioner's decision, made through an ALJ, when the  
7 determination is not based on legal error and is supported by  
8 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup>  
9 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999).  
10 "The [Commissioner's] determination that a plaintiff is not  
11 disabled will be upheld if the findings of fact are supported by  
12 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup>  
13 Cir. 1983)(citing 42 U.S.C. § 405(g)).

### 14 ALJ'S FINDINGS

15 ALJ Sherry found Scott was insured through March 31, 2010. At  
16 step one, he found Scott did not engage in substantial gainful  
17 activity after onset in April of 2009 (Tr. 15). At steps two and  
18 three, he found Scott suffers from HIV, anxiety NOS, avoidant  
19 personality disorder, major depressive disorder/depression and  
20 polysubstance abuse, impairments that are severe but do not meet  
21 or medically equal a Listed impairment (Tr. 15-16). The ALJ found  
22 Scott's allegations regarding his limitations not entirely  
23 credible (Tr. 232). The ALJ assessed an RFC for a range of light  
24 work (Tr. 20-21). At step four, relying on a vocational expert,  
25 the ALJ found Scott is able to perform his past relevant work as a  
26 short order cook, gate guard, security guard and house cleaner  
27 (Tr. 27). The ALJ found Scott has not been disabled as defined by  
28 the Social Security Act at any time after onset in April 2008 (Tr.

1 28).

2 **ISSUES**

3 Scott alleges the ALJ erred when he weighed the medical  
4 evidence. ECF No. 16 at 10-11. The Commissioner answers that  
5 because the ALJ's reasoning is supported by the record and free of  
6 legal error the Court should affirm. ECF No. 17 at 18.

7  
8 **DISCUSSION**

9 **A. Credibility**

10 Credibility determinations bear on evaluations of medical  
11 evidence when an ALJ is presented with conflicting medical  
12 opinions or inconsistency between a claimant's subjective  
13 complaints and diagnosed condition. See *Webb v. Barnhart*, 433 F.3d  
14 683, 688 (9<sup>th</sup> Cir. 2005). The ALJ gave clear and convincing  
15 reasons for his adverse credibility determination, and Scott does  
16 not challenge the determination, making it a verity on appeal.  
17 *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2  
18 (9<sup>th</sup> Cir. 2008). When he assessed credibility the ALJ considered,  
19 in part, Scott's failure to consistently seek treatment, lack of  
20 medical evidence supporting alleged limitations, ability to do  
21 volunteer work and inconsistent statements (Tr. 22-24).

22 The ALJ notes Scott failed to seek mental health treatment  
23 after he moved to Spokane, indicating perhaps he did not feel  
24 mental problems were severely limiting (Tr. 24). In February 2008,  
25 Scott told an evaluator he only wanted to establish counseling as  
26 a requirement to maintain disability and reported his depressive  
27 symptoms were well controlled with medication (Tr. 23, referring  
28 to Tr. 570-71). Scott admitted he is able to walk 8-10 blocks to

1 the store and back yet testified he has significant walking  
2 limitations. As the ALJ points out, the medical evidence and  
3 Scott's statements do not support significant walking limitations  
4 (Tr. 23). Scott testified he is unable to read a newspaper due to  
5 blurry vision yet has indicated he reads as a way to relieve  
6 stress (Tr. 23, referring to Tr. 538). The ALJ observes Scott has  
7 inconsistently reported alcohol consumption (Tr. 24, 349, 572,  
8 680). In July 2007 he volunteered at Friends for Life once a week.  
9 He continued to volunteer there in September 2007 (Tr. 24, 248,  
10 529). In July 2008, Scott reported he was looking for work (Tr.  
11 632).

12 These are clear and convincing reasons supported by  
13 substantial evidence. *Thomas v. Barnhart*, 278 F.3d 947, 958-959  
14 (9<sup>th</sup> Cir. 2002)(inconsistent statements diminish credibility);  
15 *Burch v. Barnhart*, 400 F.3d 676, 680-81 (9<sup>th</sup> Cir. 2005)(lack of  
16 consistent treatment and lack of medical evidence diminish  
17 credibility). Self-reported activities suggesting a greater  
18 functionality than claimed undermine credibility. See *Berry v.*  
19 *Astrue*, 622 F.3d 1228, 1235 (9<sup>th</sup> Cir. 2010).

20 **B. Standards for weighing opinion evidence**

21 In social security proceedings, the claimant must prove the  
22 existence of a physical or mental impairment by providing medical  
23 evidence consisting of signs, symptoms, and laboratory findings;  
24 the claimant's own statement of symptoms alone will not suffice.  
25 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated  
26 on the basis of a medically determinable impairment which can be  
27 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once  
28 medical evidence of an underlying impairment has been shown,

1 medical findings are not required to support the alleged severity  
2 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9<sup>th</sup> Cir.  
3 1991).

4 A treating physician's opinion is given special weight  
5 because of familiarity with the claimant and the claimant's  
6 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-605 (9<sup>th</sup> Cir.  
7 1989). However, the treating physician's opinion is not  
8 "necessarily conclusive as to either a physical condition or the  
9 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,  
10 751(9<sup>th</sup> Cir. 1989)(citations omitted). More weight is given to a  
11 treating physician than an examining physician. *Lester v. Chater*,  
12 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). Correspondingly, more weight is  
13 given to the opinions of treating and examining physicians than to  
14 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592  
15 (9<sup>th</sup> Cir. 2004). If the treating or examining physician's opinions  
16 are not contradicted, they can be rejected only with clear and  
17 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the  
18 ALJ may reject an opinion if he states specific, legitimate  
19 reasons that are supported by substantial evidence. See *Flaten v.*  
20 *Secretary of Health and Human Serv.*, 44 F.3d 1435, 1463 (9<sup>th</sup> Cir.  
21 1995).

22 In addition to the testimony of a nonexamining medical  
23 advisor, the ALJ must have other evidence to support a decision to  
24 reject the opinion of a treating physician, such as laboratory  
25 test results, contrary reports from examining physicians, and  
26 testimony from the claimant that was inconsistent with the  
27 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,  
28 751-752 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-1043 (9<sup>th</sup>



1 Cir. 1995).

2 **C. Mirko Zugec, M.D.**

3 Dr. Zugec evaluated Scott on September 17, 2008 (Tr. 533-43).  
4 He opined Scott is overall severely limited, by depression and  
5 avascular necrosis,<sup>1</sup> but HIV causes no significant limitations  
6 (Tr. 535). Dr. Zugec recommended a psychiatric referral (Tr. 536).  
7 Dr. Zugec had seen Scott once as a patient, in July, before he  
8 performed this evaluation. At this first visit two months earlier,  
9 the ALJ observes Scott's symptoms of depression were scored as  
10 mild (Tr. 25, 557, 560-63).

11 Scott alleges the ALJ failed to give specific, legitimate  
12 reasons supported by substantial evidence for rejecting Dr.  
13 Zugec's contradicted opinion of plaintiff's physical functioning.  
14 ECF No. 16 at 12, 19 at 2-3.

15 The Commissioner responds that the ALJ's reasons are legally  
16 and factually supported and free of error. ECF No. 17 at 9-10.

17 The ALJ observes there is no medical evidence of avascular  
18 necrosis<sup>2</sup>. According to Dr. Zugec, Scott is "claiming" he has  
19 avascular necrosis in both hips, and he told Dr. Zugec he had  
20 previously been diagnosed with this condition (Tr. 25, 537, 539).  
21 At his first appointment with Scott, Dr. Zugec notes Scott says he  
22 was diagnosed with avascular necrosis in Memphis but there are "no  
23 records of this in the chart" (Tr. 551). The ALJ points out no  
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25 <sup>1</sup>Avascular necrosis is the death of bone tissue due to a  
26 lack of blood supply. It can lead to tiny breaks in the bone and  
the bone's eventual collapse. MAYOCLINIC.COM

27 <sup>2</sup>There are occasional references in the Tennessee records to  
28 such a diagnosis (see e.g., "AVN, secondary to diclofenac," at  
Tr. 351) but no supporting evidence.

1 evidence of avascular necrosis was seen at an exam on September  
2 12, 2007, despite Scott telling the examiner "he was told that he  
3 had avascular necrosis" [The record reads "avascular neurosis,"  
4 but this appears to be a typographical error.](Tr. 16, 522-25; see  
5 also Tr. 373, 507). Imaging studies in November of 2008 showed  
6 unremarkable views of the pelvis and hips with no evidence of  
7 avascular necrosis (Tr. 25, relying on 553, 646, 653-54). Dr.  
8 Zugec later notes tests in October 2008 were negative for  
9 avascular necrosis (Tr. 732). In March 2012, treatment providers  
10 noted Scott's gait is stable, as it had been in April 2008 (Tr.  
11 16, 675). A diagnosis based on an unreliable self-report may  
12 appropriately be discounted. Medical opinions that are brief,  
13 conclusory and inadequately supported by clinical findings may  
14 properly be discredited. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216  
15 (9<sup>th</sup> Cir. 2005).

16 With respect to depression, the ALJ points out Dr. Zugec is  
17 not a mental health professional medically trained to evaluate the  
18 severity of Scott's mental health impairment. Zugec recommended  
19 psychiatric referral. Importantly, at Zugec's second appointment  
20 with him, Scott indicated depression was his number one problem  
21 related to disability (Tr. 537, 539); however, he did not wish to  
22 change his psychotropic medication (Tr. 539). This indicates  
23 symptoms were not as severe as assessed. See *Warre v. Comm'r of*  
24 *Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9<sup>th</sup> Cir. 2006)(impairments  
25 that can be effectively controlled with medication are not  
26 disabling for purposes of determining eligibility for benefits).

27 As to the only remaining diagnosed condition, Dr. Zugec  
28 opined HIV is stable and causes no significant interference with

1 functioning (Tr. 25, referring to Tr. 535, 539).

2 The ALJ's reasons are specific, legitimate and supported by  
3 substantial evidence.

4 **D. Phyllis Sanchez, Ph.D., - February 11, 2008**

5 Scott essentially alleges the ALJ failed to give specific,  
6 legitimate reasons for rejecting Dr. Sanchez's opinion. ECF No. 16  
7 at 13, 17-18.

8 Dr. Sanchez noted Scott was new to the northwest from  
9 Tennessee but seemed to have moved with no means of support. Scott  
10 was well dressed and well groomed. He denied significant problems  
11 with co-workers or supervisors<sup>3</sup>. He was not currently receiving  
12 mental health services (Tr. 544, 546-47). Dr. Sanchez opined Scott  
13 is moderately limited in the ability to perform routine tasks;  
14 respond appropriately to and tolerate the pressures and  
15 expectations of a normal work setting; control physical and motor  
16 movements and maintain appropriate behavior. She opined he may be  
17 able to return to work but has an "SSI claim pending" (Tr. 26,  
18 546-47).

19 The ALJ notes Dr. Sanchez's opinion is internally  
20 inconsistent. At the same examination, Scott scored 29 of 30 on  
21 the Mini Mental Status, where cutoff for impairment is 24. Scott  
22 stated he had no social problems (Tr. 26, 548). The ALJ opined the  
23 assessed limitations were also inconsistent with the record as a  
24 whole (Tr. 26, 544-49).

25 The ALJ is correct. The record shows Scott inconsistently  
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27 <sup>3</sup>Again in October 2008, about four months after onset, Scott  
28 stated he gets along with others, including authority figures.  
He shopped daily, taking the bus or walking. He could walk one  
hour, cook, do yard work and send emails daily (Tr. 276-86).

1 sought mental health treatment, did not establish treatment after  
2 he moved to Spokane, stated in 2008 he only wanted to establish  
3 counseling to keep disability benefits and reported his symptoms  
4 were well controlled on medication (Tr. 23, 570-75). All  
5 contradict Dr. Sanchez's assessed but unsupported limitations.

6 **E. John Arnold, Ph.D., - November 27, 2009**

7 Plaintiff alleges the ALJ failed to properly credit the  
8 opinion of Dr. Arnold, who evaluated Scott on November 27, 2009  
9 (Tr. 686-94). ECF No. 16 at 13-17. The Commissioner answers that  
10 the ALJ properly discounted the opinion because Scott clearly  
11 embellished symptoms at the evaluation, alleged limitations were  
12 unsupported by the objective evidence, and Arnold seemed to  
13 largely rely on Scott's unreliable self-report. ECF No. 17 at 15-  
14 17.

15 The Commissioner is correct.

16 Scott claimed he had experienced debilitating arthritis for  
17 2-3 years (Tr. 686), a claim unsupported by medical evidence which  
18 consistently shows no upper or lower extremity limitations (Tr.  
19 26-27, 524-25, 675). The ALJ notes Scott appeared at the  
20 evaluation with a cane and moved slowly, explained to Dr. Arnold  
21 he had to constantly wring his hands to keep them from stiffening  
22 and appeared to clearly embellish his symptoms (Tr. 26).

23 The medical evidence does not support the use of a cane, nor  
24 does it show problems with Scott's hands such as he described. The  
25 ALJ notes several physical exams revealed normal strength, etc.  
26 (Tr. 26-27). Dr. Arnold's assessed mental limitations are  
27 similarly unsupported by the record and internally inconsistent.  
28 Testing at this assessment showed adequate concentration (Tr.

1 688), yet Dr. Arnold opined Scott's understanding, memory,  
2 sustained concentration and persistence were moderate to severely  
3 limited (Tr. 26-26, 691-93). An ALJ need not accept the opinions  
4 of a doctor if that opinion is brief, conclusory, and inadequately  
5 supported by clinical findings. *Bayliss v. Barnhart*, 427 F.3d  
6 1211, 1216 (9<sup>th</sup> Cir. 2005).

7 In addition to the evidence previously discussed, the ALJ  
8 also gave weight to the September 2007 opinion of examining  
9 psychologist Hugh Moore, Ph.D., about seven months before onset.  
10 Dr. Moore noted Scott was taking zoloft. He had friends, mainly  
11 through Narcotic Anonymous. Activities included substance abuse  
12 and mental health treatment, volunteering and looking for work.  
13 Dr. Moore opined Scott's overall mental functional limitations  
14 appear mild (Tr. 26, referring to Tr. 527-30).

15 The assessed RFC adequately captures Scott's limitations and  
16 is supported by the evidence.

17 It is the role of the trier of fact to resolve conflicts in  
18 evidence. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). The ALJ  
19 acted in accordance with his responsibility to determine the  
20 credibility of the medical evidence, and he gave specific,  
21 legitimate reasons for discrediting particular opinions. See  
22 *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9<sup>th</sup> Cir. 1992);  
23 *Magallanes v. Bowen*, 881 F.2d 747, 751-752 (9<sup>th</sup> Cir. 1989).

24 Although the evidence may support more than one rational  
25 interpretation, the Court may not substitute its judgment for that  
26 of the Commissioner where, as here, proper legal standards were  
27 applied in weighing the evidence and making the decision. See  
28 *Browner*, 839 F.2d at 433; *Sprague*, 812 F.2d at 1229-1230.

1 The ALJ properly weighed the medical evidence of limitations  
2 and Scott's credibility. He came to a reasonable conclusion based  
3 on the evidence in the record, and that ends the court's inquiry  
4 on appeal. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n. 1 (9<sup>th</sup> Cir.  
5 2005)("If the record would support more than one rational  
6 interpretation, we defer to the ALJ's decision.").

7 **CONCLUSION**

8 Having reviewed the record and the ALJ's conclusions, this  
9 court finds that the ALJ's decision is free of legal error and  
10 supported by substantial evidence.

11 **IT IS ORDERED:**

12 1. Defendant's Motion for Summary Judgment, **ECF No. 17**, is  
13 **GRANTED**.

14 2. Plaintiff's Motion for Summary Judgment, **ECF No. 16**, is  
15 **DENIED**.

16 The District Court Executive is directed to file this Order,  
17 provide copies to counsel for the parties, enter judgment in favor  
18 of Defendant, and **CLOSE** the file.

19 DATED this 24th day of May, 2013.

20  
21 s/ James P. Hutton  
22 JAMES P. HUTTON  
23 UNITED STATES MAGISTRATE JUDGE  
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